In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1723.

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.,
APPELLANT,
v.
ALCOHOLIC BEVERAGES CONTROL COMMISSION (No. 1),
APPELLEE.

ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC.,
APPELLANT,
v.
ALCOHOLIC BEVERAGES CONTROL COMMISSION (No. 2),
APPELLEE.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

Motion to Dismiss.

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Motion to Dismiss.

The Appellee moves that the Court dismiss the appeal for lack of a substantial federal question. Dismissal of certain questions presented by Appellant is also moved as the decision below did not expressly pass on and Appellant did not timely or properly raise the question sought to be reviewed.

As further grounds for dismissal the Appellee states that the decision by the Massachusetts Supreme Judicial Court is plainly correct and does not present issues worthy of plenary consideration by this Court.

Respectfully submitted,

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ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

Brief in Support of Motion to Dismiss.

Opinions Below.

The opinions of the Massachusetts Supreme Judicial Court are reported at Mass. Adv. Sh. (1978) 558, 374 N.E. 2d 1181, and Mass. Adv. Sh. (1978) 580, 374 N.E. 2d 1192. The opinions are reprinted in Appendices B-1 and B-2 to the Jurisdictional Statement.

Jurisdiction.

Appellants invoke the jurisdiction of this Court by appeal pursuant to 28 U.S.C. § 1257(2).

Statutes Involved.

Licensing Board for the City of Boston (hereinafter "the Board") "Condition Thirteenth" (hereinafter "Regulation 13"), a regulation of a state agency of Massachusetts appearing on the face of the alcoholic beverages license issued by the Board:

> Thirteenth. Entertainment, if any, must be confined to a particular place, and the entertainers must not be allowed to mingle with or circulate among the patrons.

Alcoholic Beverages Control Commission (hereinafter "the Commission") Regulation 21 (4 C.M.R., Pt. 2, at 5 [1975]):

> 21. No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not.

Massachusetts General Laws c. 272, § 26:

> Whoever, for the purpose of immoral solicitation or immoral bargaining, shall resort to any cafe, restaurant, tavern, as defined in section one of chapter one hundred and thirty-eight, or other place where food or drink is sold or served to be consumed upon the premises, and whoever shall resort to any such place for the purpose of, in any manner, inducing another person to engage in immoral conduct, and whoever, being in or about any such place, shall engage in any such acts,

> and any person owning, managing or controlling such place and any employee of such person who induces or knowingly suffers any person to resort to, or be in such place for the purpose of immoral solicitation or immoral bargaining, shall be punished by a fine of not less than twenty-five nor more than five hundred dollars or by imprisonment for not more than one year, or both.

Questions Presented.

1. Whether the Appellant's facial attacks on Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, as being overbroad and vague are so substantial as to merit plenary consideration.

2. Whether Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, are constitutional as applied the conduct of the Appellant and its entertainers disclosed in the record.

Statement of the Case.

The Appellant filed two complaints in the state Superior Court seeking judicial review of two decisions by the Commission ordering the suspension of its alcoholic beverages license.[1] In both cases the Commission found that Appellant had permitted an illegality to occur on its licensed premises, in violation of Commission Regulation 21, by allowing entertainers to "mingle with or circulate among patrons" in violation of Board Regulation 13. In its second decision, *Aristocratic* (*No. 2*), the Commission also found that Appellant had permitted an illegality to occur on its

[1] The license suspension reviewed in *Aristocratic* (*No. 1*) was for ten days, Mass. Adv. Sh. (1978) at 560, 374 N.E. 2d at 1184; the license suspension reviewed in *Aristocratic* (*No. 2*) was for twenty days, Mass. Adv. Sh. (1978) at 580, 374 N.E. 2d at 1193.

licensed premises by its inducing or knowingly suffering an entertainer in its employ to be on the premises for the purpose of immoral solicitation or immoral bargaining in violation of Mass. Gen. Laws c. 272, § 26.

The Superior Court allowed the Appellee's motion for summary judgment in both cases, thereby affirming the decision of the Commission. Appellant appealed both cases to the state Appeals Court. The Superior Court granted Appellant an injunction against enforcement of the Commission's suspension orders pending the appeal. The appeals were transferred to the Supreme Judicial Court on that court's own motion prior to hearing or decision in the Appeals Court. On March 3, 1978, the Supreme Judicial Court issued opinions holding that Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, were constitutional and affirming the judgments of the Superior Court. Judgments after rescript were entered in the Superior Court on April 6, 1978, and Appellant filed a timely appeal.

Argument.

I. APPELLANT'S FACIAL ATTACKS ON BOARD REGULATION 13, COMMISSION REGULATION 21 AND MASS. GEN. LAWS C. 272, § 26, AS BEING OVERBROAD AND VAGUE ARE INSUBSTANTIAL AND DO NOT MERIT PLENARY CONSIDERATION BY THE COURT.

The Appellant argues that Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, are facially unconstitutional because they are impermissibly vague, overbroad and infringe upon rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States (Jurisdictional Statement at 6, 9). The Massachusetts Supreme Judicial Court was correct in rejecting these arguments by the Appellant, and they are so insubstantial as not to merit plenary consideration by this Court.

A. *As to the Appellant's Facial Vagueness Argument, Under the Plain Standard of Young v. American Mini Theatres, Inc., the Appellant Lacks Standing to Raise the Issue, and Even If it Does Have Standing the Argument Must be Rejected.*

The Supreme Judicial Court held that the Appellant did not have standing to assert the facial vagueness of Board Regulation 13, 374 N.E. 2d at 1185,[2] or Mass. Gen. Laws c. 272, § 26, 374 N.E. 2d at 1194, as they might be applied to others. That the Supreme Judicial Court was plainly correct in holding that the Appellant was without standing to assert the facial vagueness of Board Regulation 13 and Mass. Gen. Laws c. 272, § 26, is clear from the decisions of this Court.[3]

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[2] For convenience all subsequent *Aristocratic* citations will be to the Northeastern Reporter.

[3] It is important for the Court to note that the opinions of the Supreme Judicial Court in *Aristocratic* (*No. 1*) and *Aristocratic* (*No. 2*) did not discuss the right of privacy which the Appellant raises in its "Questions Presented" (Jurisdictional Statement at 5). The Appellant did not raise this issue before the Supreme Judicial Court. This Court has stated that the validity of a statute is not drawn in question unless the claim of invalidity and the ground therefor were brought to the attention of the state court "with fair precision and in due time." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

> [T]his Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street* v. *New York*, 394 U.S. 576, 582 (1969).

The Appellant has not made any "specific reference to the places in the record," Rule 15 of the Revised Rules of the Supreme Court of the

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), this Court held that even if a statute is vague at its "outermost boundaries" the uncertainty resulting from such vagueness has little relevance in a case where the appellant's conduct "falls squarely within the 'hard core' of the statute's proscriptions . . .." *Id.* at 608. *Accord*, *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976).

The Supreme Judicial Court found on the record before it that it was clear "that where an entertainer indiscriminately approaches patrons soliciting them to purchase drinks for him or her, the entertainer has 'mingle[d] with or circulate[d] among the patrons'" in violation of Board regulation 13. *Aristocratic* (*No. 1*), *supra*, 374 N.E. 2d at 1185. Similarly, the Supreme Judicial Court held with respect to Mass. Gen. Laws c. 272, § 26, that:

> Only a person who consciously endeavored to ignore the central meaning of those words would be able to say he did not know, and could not have known, that an offer of sexual favors in exchange for the purchase of alcoholic beverages was "immoral solicitation or immoral bargaining." [Citation omitted.] By her solicitation and conduct in a public place, Aristocratic's entertainer engaged in acts of prostitution. [Citation omitted.] *Aristocratic* (*No. 2*), *supra*, 374 N.E. 2d at 1195.[4]

United States, which would demonstrate that the privacy issue was raised before the Supreme Judicial Court. Therefore, the Appellee submits that the privacy issue sought to be raised by the Appellant is not within this Court's appellate jurisdiction as set forth in 28 U.S.C. § 1257(2).

[4] The Supreme Judicial Court found that "Aristocratic [made] no claim that it did not know what its entertainer was undertaking and did." 374 N.E. 2d at 1194 n. 3.

That court also held that Commission Regulation 21 was not unconstitutionally vague as applied to the Appellant. Thus, the Supreme Judicial Court found that the Appellant's conduct (and that of its entertainers) was within the "hard core" of conduct proscribed by Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, and that court was correct in holding that the Appellant did not have standing to challenge either the regulations or the statute as being facially vague. *Young* v. *American Mini Theatres, Inc.*, *supra*, at 61. The Appellant has not shown that the doubts of those licensees in unidentified and undefined boarderline cases of the application of the regulations and statute "involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in *Dombrowski* v. *Pfister*, 380 U.S. 479." *Ibid.*

Even if the Appellant possessed standing to argue the facial vagueness of the regulations and the statute, such argument would be doomed to failure. With respect to Board Regulation 13, the Appellant contends that the concept of allowing entertainers to "mingle with or circulate among" patrons is not sufficiently clear to convey an adequately definite warning to potential defendants through standards establishing boundaries which will provide sufficient guidance to judges and juries in most cases (Jurisdictional Statement at 7). See *Roth* v. *United States*, 354 U.S. 476, 491-492 (1957). This Court has consistently held that lack of precision is not itself offensive to the requirements of due process. *Roth*, *supra* at 491. *Accord*, *Hamling* v. *United States*, 418 U.S. 87, 111 (1974). The Constitution does not require impossible standards; all that is required is that the challenged language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States* v.

Petrillo, 332 U.S. 1, 7-8 (1947). *Accord, Roth, supra*; *Hamling, supra*.

The word "mingle" has been held to have a clear connotation to the ordinary mind. See *New Orleans* v. *Kiefer*, 246 La. 305, 312, 164 So. 2d 336, 339 (1964); *Miami* v. *Kayfetz*, 92 So. 2d 798, 802 (Fla. 1957); *People* v. *King*, 115 Cal. App. 2d Supp. 875, 879, 252 P. 2d 78, 80 (1952). Similarly, the verb "circulate" has a clear meaning to a person of common intelligence. (*Webster's Third New International Dictionary* at 412 defines "circulate" to mean "3. to move, pass, or go around freely from person to person or place to place.") Therefore, the Appellant's facial vagueness challenge to Board Regulation 13 must fail.

Similarly, the Appellant's attack on the phrase "permit . . . any illegality" in Commission Regulation 21 is misplaced. The Supreme Judicial Court authoritatively construed the term "illegality" as used in Commission Regulation 21 to mean "any violation of any statute or regulation having the force of law." *Aristocratic* (*No. 2*), *supra*, at 1193; see *Aristocratic* (*No. 1*), *supra*, at 1185 n. 4. It is now impossible for the Appellant to argue with any success that the phrase "permit . . . any illegality" in Commission Regulation 21 is vague.

Finally, the terms "immoral solicitation" and "immoral bargaining" found in Mass. Gen. Laws c. 272, § 26, are not vague. In their ordinary and popular sense these terms must be taken and understood to refer to and denote sexual immorality in solicitation or bargaining. *Cf., Commercial Pictures Corp.* v. *Board of Regents*, 305 N.Y. 336, 113 N.E. 2d 502, 506 (1953), *reversed on other grounds sub nom. Superior Films, Inc.* v. *Department of Education of Ohio*, 346 U.S. 587 (1954); *Deadwyler* v. *Grand Lodge, Knights of Pythias*, 131 S.C. 335, 126 S.E. 437, 437-438 (1925). Furthermore, any doubt that, as used in Mass. Gen. Laws

c. 272, § 26, those terms refer to sexual behavior evaporates when they are considered in the context of the surrounding statutory provisions which are concerned primarily with socially undesirable sexual conduct. See Mass. Gen. Laws c. 272, §§ 1-35A.

Also, even though the Supreme Judicial Court declined the opportunity in *Aristocratic* (*No. 2*), the term "immoral solicitation or immoral bargaining" is readily susceptible to a narrowing construction by the State courts. Perhaps the Supreme Judicial Court was heeding this Court's admonition that "if there is any difficulty [with vagueness in Mass. Gen. Laws c. 272, § 26,] . . . it will be time enough to consider it when raised by someone whom it concerns." *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930); *accord, Broadrick* v. *Oklahoma*, 413 U.S. 601, 609 (1973). See *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 61.

For all of the above reasons the challenged statute and regulations are clearly not unconstitutionally vague on their face. The Appellant's facial vagueness challenge, thus, does not merit plenary consideration by the Court.

B. *The Appellant's Facial Overbreadth Argument Does Not Rise to a Level Which Merits Plenary Consideration by This Court.*

In *Broadrick* v. *Oklahoma*, *supra*, the Court, while recognizing that its traditional rules of standing have been altered in the First Amendment area to permit, in some instances, attacks on overly broad statutes by those within the "hard core" of the statutory prohibition, 413 U.S. at 612, held that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation

to the statute's plainly legitimate sweep." *Id.* at 615. The Supreme Judicial Court correctly applied *Broadrick* in its determination that Mass. Gen. Laws c. 272, § 26, was not unconstitutionally overbroad. See *Aristocratic* (*No. 2*), *supra*, 374 N.E. 2d at 1194. Any overbreadth in c. 272, § 26, is not substantial for two reasons. First, there is not a vital interest in conduct on the borderline between constitutionally protected and unprotected immoral conduct, as there is in the free dissemination of ideas of social and political importance, *cf. Young* v. *American Mini Theatres, Inc.*, *supra*, 427 U.S. 50, 61, and, second, although the Supreme Judicial Court declined to do so in *Aristocratic* (*No. 2*), c. 272, § 26, is "readily subject to a narrowing construction by the state courts." See *Young* v. *American Mini Theatres, Inc.*, *supra*, at 60; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). Therefore, the Appellee submits that the Supreme Judicial Court was correct in holding that the Appellant could not succeed in its contention that Mass. Gen. Laws c. 272, § 26, was facially overbroad in violation of the First Amendment.

The Supreme Judicial Court did not comment on the Appellant's facial overbreadth argument with regard to Board Regulation 13; it found that regulation to be facially consistent with the First Amendment's guarantees because of the State's broad regulatory powers under the Twenty-first Amendment to the Constitution. *Aristocratic* (*No. 1*), *supra*, at 1186. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); *California* v. *LaRue*, 409 U.S. 109, 114-116 (1972). The Appellee submits, however, that this argument by the Appellant is without merit.[5]

[5] The Appellant's reliance on the dissenting Justice's statement in *Aristocratic* (*No. 1*) that Board Regulation 13 imposed a real and substantial deterrent on the exercise of the rights of free expression and assembly has no merit. See Jurisdictional Statement at 9. Those rights arose under Articles 16 and 19 of the Constitution of Massachusetts, *Aristocratic* (*No. 1*) at 1191, as the Appellant admits (Jurisdictional Statement at 9). Therefore, no federal question is presented by the view of the dissenting Justice.

As the Supreme Judicial Court opinion makes clear, Board Regulation 13 by its terms forbids only conduct. *Aristocratic* (*No. 1*) at 1186 n. 5. The restraint on speech is indirect. *Ibid.* Therefore, the overbreadth scrutiny of this type of regulation is "less rigid" as the regulation regulates "conduct in the shadow of the First Amendment . . .." See *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 614. The regulation regulates the licensee's and entertainer's conduct in at least as neutral and noncensorial a manner as the statute regulating political activity in *Broadrick*. Furthermore, the Supreme Judicial Court found that the speech element associated with the conduct of entertainers mingling with or circulating among patrons was "carried on solely for profit," and the information transmitted by such speech was "inconsequential." *Aristocratic* (*No. 1*) at 1186. Board Regulation 13 is thus at the end of the "speech-conduct spectrum" detailed in *Broadrick* v. *Oklahoma* at 615, where, although protected speech may be deterred to some unknown extent, "that effect . . . cannot, with confidence, justify invalidating a statute on its face and so [prohibit] a State from enforcing [the regulation] against conduct that is admittedly within its power to proscribe." 413 U.S. at 615.[6] Therefore, the Appellant's facial overbreadth argument must fail.

[6] The Appellee submits that since the speech engaged in by the Appellant is commercial in nature, carried on solely for profit, it may be regulated in time and place by a regulation such as Board Regulation 13. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). "[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial [speech] context." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380 (1977). Thus, the Appellant is without standing to raise the

The Supreme Judicial Court also found that the Appellant did not have standing to invoke the overbreadth doctrine because it had not shown, and had offered no evidence or any hypothetical set of facts to show, that Board Regulation 13 would have a real and substantial deterrent effect on a third party's protected rights. *Aristocratic* (*No. 1*) at 1187. In any case, for a plaintiff to have standing he must show a nexus between the challenged governmental action and the constitutionally protected interest asserted as the ground for the invalidity of the action. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).[7] This doctrine also holds true when a plaintiff is asserting the rights of a third party. *Id.* at 40.

The Appellant was, thus, required to set forth facts which would demonstrate to the Supreme Judicial Court that the third person whose First Amendment rights it sought to protect by claiming that Board Regulation 13 was overbroad would indeed be injured by the regulation. Having failed to set forth facts which would show that any third party would be injured in fact by the application of Board Regulation 13, the Appellant lacks standing to proceed to the merits of its overbreadth claim.

For the reasons stated above the Supreme Judicial Court was clearly correct in rejecting the Appellant's facial vagueness and overbreadth challenges. As a consequence these issues do not present substantial federal questions which require plenary consideration by the Court. The appeal should be dismissed.

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issue of the overbreadth of the regulation because of the commercial nature of its entertainers' conduct and speech.

[7] It was seemingly the lack of this nexus required by *Simon* which led the Court to hold in *Young* v. *American Mini Theatres, Inc.*, that the respondent did not have standing in that case.

II. Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, are Constitutional as Applied to the Conduct of the Appellant and its Entertainers Disclosed on the Record.

The Supreme Judicial Court held that Board Regulation 13, Commission Regulation 21 and Mass. Gen. Laws c. 272, § 26, were constitutional as applied to the conduct of the Appellant and its entertainers disclosed on the record before that Court. *Aristocratic* (*No. 1*) at 1186; *Aristocratic* (*No. 2*) at 1193, 1195. In ascertaining whether the Supreme Judicial Court was correct this Court must begin with the proposition that under the Twenty-first Amendment the State can regulate the exercise of First Amendment rights in places where alcoholic beverages are sold, which regulation would elsewhere be constitutionally impermissible. See *California* v. *LaRue*, 409 U.S. 109, 114-116 (1972); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975). Also, state regulation of First Amendment rights under authority of the Twenty-first Amendment need only have a rational relationship to the state purpose sought to be achieved, *California* v. *LaRue*, *supra*, 409 U.S. 109, 116, 118, instead of the compelling state interest which the State has the burden of demonstrating in other areas, see, *e.g.*, *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 611-612; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439 (1963).

Board Regulation 13 prohibits entertainers from mingling with or circulating among patrons only while on the premises licensed by the Board to sell alcoholic beverages. The regulation does not prohibit entertainers from associating with patrons outside of the licensed premises; it does not prohibit entertainers from communicating with patrons, either on stage during their entertainment act or off stage. Board Regulation 13 only prohibits the *conduct* of enter-

tainers mingling with or circulating among patrons on the licensed premises.

The Supreme Judicial Court found that the regulation is rationally related to the State's interest in prohibiting entertainers from soliciting patrons to buy them drinks, which solicitation, that Court found, with ample support on the record before it, often is "a prelude to the solicitation of a customer to engage in sexual activity." *Aristocratic* (*No. 1*) at 1186.[8] Given this rational basis for Board Regulation 13, the fact that it prohibits entertainers from mingling with or circulating among patrons only in establishments licensed by the Board to sell alcoholic beverages, and the fact that the regulation does not prohibit communication by entertainers with patrons, only the conduct of mingling with or circulating among patrons, the Appellee submits that Board Regulation 13 is an appropriate regulation of the time, place and manner in which this conduct of entertainers can be engaged in. See *California* v. *LaRue*, *supra*, at 118.

[8] Although this Court has held that commercial speech is protected by the First Amendment, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. 748; *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. 350, the Court has acknowledged that commercial speech is subject to regulation as to its time, place and manner. 425 U.S. at 771; see n. 6, *supra*. One type of "time, place, and manner regulation" may be the restraint of in-person solicitation for pecuniary gain. See *Bates*, *supra*, at 384; *Ohralik* v. *Ohio State Bar Association*, ___ U.S. ___, Slip. Op. No. 76-1650 (May 30, 1978). Compare *In re Primus*, ___ U.S. ___, Slip Op. No. 77-56 (May 30, 1978) (no pecuniary gain involved). Indeed, the Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik*, *supra*, Slip Op. at 8, 9. Therefore, the Appellee submits that Board Regulation 13 is permissible as a "time and place" regulation of commercial conduct and speech and may be upheld as such.

The Appellant's entertainers engaged in the solicitation of drinks from patrons. *Aristocratic* (*No. 1*) at 1184; *Aristocratic* (*No. 2*) at 1194. The word "mingle" is not vague when applied to such conduct.[9] The fact that this conduct might possibly be prohibited by some non-prophylactic regulation does not undermine the validity of Board Regulation 13;[10] the Board's choice of a prophylactic solution must be sustained if it is reasonable. See *California* v. *LaRue* at 116. Since it is rationally related to the interest which the Board seeks to protect and since the conduct of the Appellant's entertainers was plainly within the "hard core" of the regulation's proscription, Board Regulation 13 is not unconstitutionally vague or overbroad as applied to the conduct of the Appellant and its entertainers. Therefore, no substantial federal question is presented by these issues.[11]

[9] *See also*, *New Orleans* v. *Kiefer*, 246 La. 305, 312, 164 So. 2d 336, 339 (1964); *Miami* v. *Kayfetz*, 92 So. 2d 798, 802 (Fla. 1957); *People* v. *King*, 115 Cal. App. 2d Supp. 875, 879, 252 P. 2d 78, 80 (1952), holding that the word "mingle" has a clear connotation to the ordinary mind.

[10] The Supreme Judicial Court noted, but did not decide, that the "prohibition of entertainers' indiscriminate solicitation of drinks may be enforceable effectively only by prohibiting entertainers from mingling with and circulating among patrons." *Aristocratic* (*No. 1*) at 1186 n. 6. This Court has recently sanctioned such prophylactic measures as Board Regulation 13, "whose objective is the prevention of harm before it occurs," in relation to in-person solicitation by attorneys. *Ohralik*, *supra*, Slip Op. at 16, 19, 20. Given the facts that the State's interests under the Twenty-first Amendment are at least as substantial as its interest in regulating the legal profession, and that the speech element of the entertainers' solicitation is as commercially oriented as and less substantial than the speech in *Ohralik*, see *Aristocratic* (*No. 1*) at 1186, n. 5, the Court's holding that Ohio's prophylactic rule against an attorney's in-person pecuniary solicitation was "not unreasonable, or violative of the Constitution," *Ohralik*, *supra*, Slip Op. at 19, would seem particularly appropriate for application to the facts of the instant appeal.

[11] The Appellant argues that *California* v. *LaRue* is not applicable in the instant case because Board Regulation 13 does not prohibit activity

Mass. Gen. Laws c. 272, § 26, is similarly constitutionally valid when applied to the conduct of the Appellant and its entertainers found in the record. After an investigator of the Commission ordered her a drink the Appellant's entertainer engaged in certain sexual stimulation and suggested that she and the investigator could have "a real good time" if he would buy her a bottle of champagne for eighteen dollars. *Aristocratic* (*No. 2*) at 1194. After the investigator purchased a bottle of the champagne, the entertainer again began to sexually stimulate the investigator. *Ibid.* Only when the champagne was gone, and the investigator stated that he had no more money, did the entertainer leave his presence. *Ibid.*

By her conduct the Appellant's entertainer engaged in acts of prostitution. *Id.* at 1195. Certainly, there can be no doubt that her conduct amounted to "immoral solicitation or immoral bargaining." *Ibid.*[12]

which "partake[s] more of gross sexuality than of communication." 409 U.S. at 118 (Jurisdictional Statement at 10.) The Appellant's argument is not on point, however; the activity in *LaRue* was found by the Court to be, in part at least, "within the limits of the constitutional protection of freedom of expression . . .." *Ibid.* That activity would not seem to be subject to any less First Amendment protection than the speech in the instant case, which the Supreme Judicial Court found to be "carried on solely for profit" and which transmitted "inconsequential" information. *Aristocratic* (*No. 1*) at 1186.

Since both types of conduct take place in establishments licensed to sell alcoholic beverages, they should be judged by the same standard. The Board's Regulation 13 should, thus, be sustained on the authority of *LaRue*.

[12] The entertainer's immoral solicitation and bargaining was certainly no more than commercial speech; she advertised that she would sell a certain product, "a real good time," for a certain price, one or more bottles of champagne. See *Virginia State Board of Pharmacy, supra,* at 761. Since prostitution is illegal, the activity engaged in by the Appellant and its entertainer may be suppressed or penalized consistent with the First Amendment. See *Bates* v. *State Bar of Arizona, supra,* at 384; *Virginia State Board of Pharmacy, supra,* at 772; *Pittsburgh Press Co.* v. *Pittsburgh Human Relations Comm'n,* 413 U.S. 376, 388-389 (1973).

It may be that a person at the outer boundaries of c. 272, § 26, may have a problem ascertaining if his or her conduct is moral or immoral. At that time, however, the Supreme Judicial Court can undertake to define the statute's permissible limits. *Cf. Aristocratic* (*No. 2*) at 1195. That vagueness "has little relevance" to the Appellant's conduct and that of its entertainer. See *Broadrick* v. *Oklahoma,* 413 U.S. 601, 608. The Appellant's conduct, and that of its entertainer, is within the "hard core" of the statute's proscription, and the statute is, thus, not vague as applied to the Appellant.

Similarly, the fact that c. 272, § 26, may be overbroad in that it may prohibit as immoral some constitutionally protected speech or conduct does not make it overbroad as applied to the Appellant's conduct in this case. Even the Appellant makes no suggestion that the prostitution which its entertainer engaged in is constitutionally protected conduct. *Cf. Pittsburgh Press Co.* v. *Pittsburgh Human Relations Comm'n,* 413 U.S. 376, 388-389 (1973). Since the Supreme Judical Court's holding that the conduct of the Appellant was within the hard core of the statutory prohibition is plainly correct, this issue also presents no substantial federal question for this Court to review.

Finally, the Appellee submits that the Appellant's claim that Commission Regulation 21 is overbroad was not expressly passed on by the Supreme Judicial Court in either of its *Aristocratic* opinions. That Court held only that the word "illegality" as used in Commission Regulation 21 was not unconstitutionally vague. *Aristocratic* (*No. 2*) at 1193. For the reasons set forth in note 3, *supra,* this issue, which the Appellant seeks to raise before this Court, is not within the appellate jurisdiction of this Court as set forth in 28 U.S.C. § 1257(2).

The Appellee is uncertain if the Appellant seeks to raise the issue of the alleged unconstitutional vagueness of Commission Regulation 21.[13] Assuming that the Appellant seeks to bring the issue of Commission Regulation 21's alleged vagueness before the Court, the Appellee observes that the construction placed on that regulation by the Supreme Judicial Court has removed any vagueness which might have previously infected the regulation. That Court held that "the word 'illegality' in Regulation 21 means any violation of any statute or regulation having the force of law." *Aristocratic* (*No. 2*) at 1193. *See also*, *Aristocratic* (*No. 1*) at 1185 n. 4. This meaning of "illegality" leaves little doubt that the word is not so vague that "[people] of common intelligence must necessarily guess at its meaning." *Broadrick* v. *Oklahoma*, *supra*, at 607, and cases cited. Indeed, this construction leaves little room at all for guessing: A licensee has either permitted the violation of a statute or regulation having the force of law or has not permitted an illegality to take place.

The Appellant permitted the violation of Mass. Gen. Laws c. 272, § 26, and Board Regulation 13, a regulation having the force of law, see *Massachusetts Electric Co.* v. *Massachusetts Commission Against Discrimination*, Mass. Adv. Sh. (1978) 1189, 1201 n. 5, 375 N.E. 2d 1192, 1200 n. 5, on its licensed premises. Therefore, its conduct was clearly within the proscription of Commission Regulation

[13] In the section of the Jurisdictional Statement entitled "Statement" the Appellant argues that Commission Regulation 21 is vague, Jurisdictional Statement at 7, and overbroad, *id.* at 8. In the section of the Jurisdictional Statement alleging that the "The Questions Are Substantial" there is no discussion of the regulation, however.

21.[14] Its Fourteenth Amendment due process rights were not violated. See *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. 601, 607-609.

Conclusion.

For the reasons stated above the appeal should be dismissed.

Respectfully submitted,

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[14] *Compare*, 42 U.S.C. § 1983, which prohibits the deprivation of rights, et cetera, "under color of any statute, ordinance, regulation, *custom*, or *usage*." (Emphasis supplied.)